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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

HAKOP JACK BALIAN et al., Plaintiffs and Appellants, v. RELIANCE ENVIRONMENTAL CONSULTING, INC., Defendant and Respondent.	B255730 (Los Angeles County Super. Ct. No. BC448677)

APPEAL from a judgment of the Superior Court of Los Angeles County. Amy D. Hogue, Judge. Affirmed.

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Gary Rand & Suzanne E. Rand-Lewis for Plaintiffs and Appellants.

Gordon & Rees, Miles D. Scully, Matthew G. Kleiner and J. Todd Konold for Defendant and Respondent.

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Plaintiffs Hakop Balian and Varouhi Balian tendered a claim to their insurer, California FAIR Plan (FAIR Plan), for property damage caused by smoke, ash, and soot from the 2009 Station Fire. FAIR Plan's claims adjuster retained defendant Reliance Environmental Consulting, Inc. (REC), which inspected the Balians' house, collected samples for testing, analyzed the test results, and submitted a report to the adjuster. After FAIR Plan denied the Balians' claim, the Balians sued FAIR Plan, the claims adjuster, and REC. Their claims against REC included: violation of the Consumer Legal Remedies Act (CLRA) (Civ. Code, § 1750 et seq.); intentional infliction of emotional distress; negligence; violation of the unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.); concealment; and violation of the Unruh Civil Rights Act (Unruh Act) (Civ. Code, § 51).

REC successfully demurred to the CLRA, intentional infliction of emotional distress, and negligence causes of action. The remaining claims against REC were disposed of by summary judgment. After the entry of judgment, REC filed a memorandum of costs, which the Balians moved to strike or tax. The court granted the motion in part and denied it in part.

The Balians appealed. They contend the court erred by: (1) sustaining REC's demurrers, (2) denying their request to continue the hearing on REC's motion for summary judgment, (3) granting REC's motion for summary judgment, and (4) denying in part their motion to tax costs. We reject these contentions and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

1. *The Balians' Complaints*

The Balians filed their original complaint in November 2010 and a first amended complaint (FAC) in May 2011. In the complaint and FAC, the Balians alleged the following: The 2009 Station Fire inundated their house with smoke and ash causing damage to the exterior and interior of the home. They presented a claim to FAIR Plan under their homeowners policy. FAIR Plan's claims adjuster, John S. Rickerby Company, Inc. (Rickerby), met with the Balians and informed them that a "hygienist" would inspect the premises. Rickerby hired REC, which conducted environmental

testing at the Balians' house. REC concealed from the Balians that it "purposefully failed to take samples from areas where smoke, soot and ash were, and thus purposefully skewed its test results, so as to permit [FAIR Plan] to deny [the Balians'] claims." Rickerby thereafter informed the Balians that their claim had been denied based upon REC's report.

The Balians alleged that the denial of their claim was based on numerous "wrongful and illegal factors," including: REC's "use [of] certain particulate levels in its evaluations that would automatically result in a denial of claims"; the Balians' "ethnicity [and] ethnic sounding name and appearance" (the Balians described themselves as being of "Armenian ethnicity"); REC's use of a "'list' . . . of claims to deny"; REC's skewing and falsification of its data and analysis; and REC's failure to advise the Balians "of the significant risks to health and well being due to smoke and contamination."

The Balians further alleged that REC "found carbon/soot/ash in the furniture and furnishings throughout the premises[,] as well as the exterior[,] but falsely discount[ed] same" so that FAIR Plan would not have to pay for damages. FAIR Plan, Rickerby, and REC also agreed "to falsely eliminate any claims or conclude that claims were below the deductible so no payment would be required."

After the court sustained demurrers to the Balians' CLRA, intentional infliction of emotional distress, and negligence claims, the Balians filed a second amended complaint (SAC), asserting causes of action against REC for violation of the UCL, concealment, and violation of the Unruh Act. The general factual allegations remained substantially unchanged from the FAC. REC answered the SAC in June 2012.

2. *REC's Motion for Summary Judgment*

REC filed its motion for summary judgment on September 25, 2013. The motion was supported by testimony from the Balians' depositions and a declaration by Steven Finkelstein, REC's owner and sole employee. Finkelstein declared that Rickerby retained REC to inspect the Balians' home and take samples of possible soot, ash, and smoke damage. He was not engaged to act as "an insurance carrier or a claims adjuster."

Finkelstein never met Varouhi.[1] He met Hakop at the Balians' residence and engaged in "initial pleasantries" with him before the inspection.

Finkelstein described the process of taking samples from the Balians' residence with adhesive tape and a "micro-vacuum." He sent the samples to a laboratory for testing. After Finkelstein received the laboratory's test results, he prepared a report to Rickerby in which he stated that none of the 28 samples taken from the house had "more than a trace of carbon/soot/ash." A "trace" was defined as no more than one identifiable particle. Finkelstein stated that he "would not consider the levels of carbon/soot/ash found as evidence of severe widespread contamination," and concluded that "[r]egular and thorough housecleaning should be sufficient to address the levels of carbon/soot/ash found in the occupied areas of the residence."

Finkelstein declared that he never prepared or saw any list of "suspect claims" concerning Armenians or others, and never entered "into any 'agreement,' 'plan,' or 'scheme' with any of the co-defendants to minimize or falsify wildfire byproduct damage claims, reports, or laboratory results, much less a scheme predicated on anti-Armenian bias." He performed his work "without ever considering race, nationality or any other unlawful or discriminatory 'standard,' or altering [his] protocol to understate smoke, ash, or soot damage." Finally, he never made "any discriminatory comments" to the Balians.

Vardouhi testified at her deposition that she was not aware of any plan by FAIR Plan to deny or treat as suspect any claims submitted by people "with an ethnic-sounding last name," and had no knowledge that REC purposefully failed to sample areas in her home to skew test results.

Hakop testified at his deposition that he had never seen any list of claims to be denied, and was unaware of any document that REC had used in connection with the insurance claim. When asked whether he had any reason to believe that FAIR Plan had used false information to deny his claim, Hakop said, "I don't know." When asked if he believed that REC had discriminated against him in any way, Hakop responded:

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[1] For the sake of clarity, we sometimes refer to the Balians by their first names. No disrespect is intended.

"Can't tell." Neither of the Balians saw Finkelstein's report to Rickerby prior to their depositions in this case.

In opposing the motion for summary judgment, the Balians relied upon Hakop's deposition testimony regarding a conversation between Finkelstein and him just before Finkelstein's inspection of the Balians' house:

"[Finkelstein] said, 'You have a nice house, a big house.'

And I said, 'Thank you.'

And [Finkelstein] was writing down some things. And then he asked me, 'What's your name?'

And I said, 'Jack.'

And then he asked, 'Where are you from originally?'

I said, 'Armenia.'

And then he looked up and said, 'Oh.'"

Hakop further testified that Finkelstein "kind of looked [at] me in a kind of lopsided way." Hakop asked Finkelstein, "'[i]s there a problem?"; Finkelstein responded, "'No, no, no, no.'"

Hakop testified that he believed that Finkelstein was prejudiced against him based on Finkelstein's questions, the tone of his voice, "the way he looked at" Hakop, and because Finkelstein went about the inspection "very quickly and too fast." Hakop further testified that, although Finkelstein used adhesive tape to obtain samples "wherever he could see blackness," Finkelstein did not take any samples from outside the residence.

The Balians also relied on a declaration from Brad Kovar, an indoor environmental consultant with Safeguard EnviroGroup, Inc. (SEG). SEG performed a wildfire by-product damage assessment of the Balians' residence on March 31, 2010, after FAIR Plan had denied the Balians' claim. SEG's inspection "revealed evidence indicating the presence of fire byproduct particulates on all surfaces sampled in the areas investigated." (Underline in original.) A "significant contribution to elevated indoor particles was from penetration of outdoor particulates . . . ." In SEG's opinion, "specialty

cleaning is required to reduce wildfire-related smoke particulates in the area(s) sampled and the balance of the structure."

Kovar criticized REC's inspection and sampling methods, the methodology used by the testing laboratory, the test results, and REC's analysis and conclusions. Kovar opined that "the elevated levels of char/ash found at the Balian residence would be considered damage, warranting professional cleaning by most qualified Hygienist firms that publish damage thresholds including REC."

Finally, the Balians relied on Finkelstein's deposition testimony that he did not inspect the Balians' pool.[2]

In addition to opposing REC's motion on the merits, the Balians requested a continuance to conduct further discovery.

The court denied the request for a continuance and granted the summary judgment motion.

Additional facts will be discussed below where pertinent to the issues raised in this appeal.

DISCUSSION

1. *Rulings On Demurrers*

The Balians contend that the trial court erred by sustaining REC's general demurrers to their causes of action for violation of the CLRA, intentional infliction of emotional distress, and negligence. We reject these contentions.

In reviewing the sufficiency of a complaint against a general demurrer, we "'treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a

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[2] The trial court sustained some of REC's objections to portions of the Balians' evidence. The Balians do not challenge these rulings. We do not, therefore, consider the evidence to which REC's objections were sustained. (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 285.)

demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

A. *CLRA*

The CLRA prohibits certain "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer." (Civ. Code, § 1770, subd. (a).) The Balians alleged that REC had violated the CLRA in numerous ways arising from the purchase and sale of their homeowners insurance policy and the defendants' handling of their insurance claim. REC demurred on the ground that claims involving insurance are not subject to the CLRA. Relying primarily on *Fairbanks v. Superior Court* (2009) 46 Cal.4th 56 (*Fairbanks*), REC argued that insurance contracts are not subject to the CLRA. The trial court agreed, as do we.

In *Fairbanks*, the plaintiffs alleged that the defendant insurance company violated the CLRA by engaging in various deceptive and unfair practices in the marketing and administration of certain life insurance policies. (*Fairbanks, supra,* 46 Cal.4th at p. 60.) Our state Supreme Court held that life insurance is not subject to the protections of the CLRA. "Life insurance," the Court explained, "is a contract of indemnity under which, in exchange for the payment of premiums, the insurer promises to pay a sum of money to the designated beneficiary upon the death of the named insured." (*Id.* at p. 61.) It is neither a "good" nor a "service" as these terms are defined in the CLRA.[3] (*Ibid.*)

The *Fairbanks* Court observed that the CLRA was adapted from a model law that specifically defined "'services'" to include "'*insurance*.'" (*Fairbanks, supra,* 46 Cal.4th at p. 61, quoting National Consumer Act (Nat. Consumer L. Center 1970) § 1.301,

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[3] "Goods" are defined in the CLRA as "tangible chattels bought or leased for use primarily for personal, family, or household purposes, including certificates or coupons exchangeable for these goods, and including goods that, at the time of the sale or subsequently, are to be so affixed to real property as to become a part of real property, whether or not they are severable from the real property." (Civ. Code, § 1761, subd. (a).)

"'Services' means work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods." (Civ. Code, § 1761, subd. (b).)

subd. (37), pp. 23–24, italics in *Fairbanks*.) In the CLRA, however, the Legislature omitted insurance from the definition of services, "thereby indicating its intent *not* to treat all insurance as a service under the [CLRA]." (*Fairbanks, supra*, 46 Cal.4th at p. 61.) The *Fairbanks* Court "further confirmed" this intent by comparing the definition of "services" in the CLRA to the definition of "services" in the previously-enacted Unruh Act. Although the two definitions are similar, "services" under the Unruh Act expressly included the provision of insurance. (*Id.* at p. 62, citing Civ. Code, § 1802.2.) "The use of differing language in otherwise parallel provisions," the Court reasoned, "supports an inference that a difference in meaning was intended" and "provides additional evidence that the Legislature did not consider insurance itself to be a service for purposes of consumer protection legislation." (*Id.* at p. 62.) Finally, although the Court acknowledged that the CLRA is to be "'liberally construed and applied to promote'" its consumer protection purposes, a liberal construction mandate cannot be invoked when, as here, the meaning of the statutory language is clear. (*Id.* at p. 64.)

The Balians point out that the *Fairbanks* opinion states that the Court was "focus[ed] only on life insurance," and not insurance generally. (*Fairbanks*, *supra*, 46 Cal.4th at p. 60, fn. 1.) The Balians do not, however, offer any basis why the Court's reasoning in *Fairbanks* should not apply here. Homeowners insurance, like life insurance, "is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event." (Ins. Code, § 22.) In the case of life insurance, the contingent or unknown event is "the death of the named insured" (*Fairbanks, supra*, 46 Cal.4th at p. 61); in the case of property insurance under a homeowners policy, the event is a covered loss to insured property (*Garvey v. State Farm Fire & Casualty Co.* (1989) 48 Cal.3d 395, 406; see Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2014) ¶ 6:200, p. 6B-1). The different triggering event in a homeowners policy does not make that contract of indemnity any more of a good or service than a life insurance policy.

Finally, other courts have recently applied *Fairbanks* in contexts other than life insurance, such as mortgage loans (*Alborzian v. JPMorgan Chase Bank, N.A.* (2015)

235 Cal.App.4th 29, 40) and home warranty contracts, which are "analogous to insurance" (*Campion v. Old Republic Home Protection Co, Inc.* (S.D.Cal. 2012) 861 F.Supp.2d 1139, 1145-1146). In light of *Fairbanks*' rationale, the Legislative intent regarding the CLRA, and these recent decisions, we conclude that the CLRA does not apply to claims arising from the Balians' homeowners insurance policy.

The Balians rely on *Broughton v. CIGNA Healthplans of California* (1999) 21 Cal.4th 1066, which involved a claim under the CLRA that the defendant health plan had deceptively and misleadingly advertised the quality of medical services provided under the plan. (*Id.* at p. 1072.) The issue in *Broughton*, however, was whether a claim brought under the CLRA may be subject to arbitration. (*Ibid.*) The court did not decide or even consider whether the claim stated a cause of action under the CLRA. The case is not, therefore, relevant here. (See *McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613, 626 [cases are not authority for propositions not considered].)

B. *Intentional Infliction of Emotional Distress*

The trial court sustained REC's demurrer to the Balians' cause of action for intentional infliction of emotional distress. The trial court did not err.

The elements of a cause of action for intentional infliction of emotional distress are "'"(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. . . .' Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community.' [Citation.]" (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.) It does not include "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.' [Citation.]" (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1122.) "'It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery.' . . . [Citation.]" (*Fuentes v. Perez* (1977) 66 Cal.App.3d 163, 172.)

To support their intentional infliction of emotional distress claim, the Balians point to their allegations in the FAC that REC: (1) found carbon, soot, and ash throughout their premises but "falsely discounted same so [FAIR Plan] would not have to pay for damages"; (2) knew the contaminants on the premises compromised and impaired the Balians' health and enjoyment of the property; and (3) "acted in this manner due to [the Balians'] ethnicity and national origin (Armenian)." The Balians do not refer us to any supporting authority and make only a conclusionary assertion that the allegations were sufficient. The conduct alleged, we conclude, is not so extreme and outrageous as to exceed all bounds of that usually tolerated in a civilized community. (See, e.g., *Yurick v. Superior Court* (1989) 209 Cal.App.3d 1116, 1129 [no intentional infliction of emotional distress claim where defendant supervisor called plaintiff senile and a liar on multiple occasions].)

C. *Negligence*

"'Actionable negligence involves a legal duty to use due care, a breach of such legal duty, and the breach as the proximate or legal cause of the resulting injury.' [Citation.] . . . Whether a duty of care exists 'in a particular case is a question of law to be resolved by the court. [Citation.]'" (*Beacon Residential Community Assn. v. Skidmore, Owings & Merrill LLP* (2014) 59 Cal.4th 568, 573.)

The Balians challenge the trial court's ruling sustaining REC's demurrer to their negligence cause of action. Because the alleged facts do not establish that REC owed a duty of care to the Balians, the court did not err.

Regarding the element of duty, the Balians alleged they "sought information and advice concerning the ash, soot and smoke damages from the Station Wildfire" and that REC, by representing itself as an expert in such matters and as "having superior training, education and knowledge," "created a duty thereby." REC allegedly breached this duty when it: "engaged in acts and conduct of careless and reckless disregard whereby [it] failed to acknowledge [its] obligations to properly and timely inspect, and adjust [the Balians'] ash, soot and smoke damages from the Station Wildfire losses and damages; engaged in an incomplete, discriminatory, biased and inaccurate delay and evaluation of

[the Balians'] benefits for losses and damages; failed to determine the existence and/or extent and nature of all of [the Balians'] ash, soot and smoke damages from the Station Wildfire losses and damages; [and] further failed to acknowledge [FAIR Plan's] obligations to properly pay the full value for [the Balians'] ash, soot and smoke damages from the Station Wildfire losses and damages . . . ."

The Balians offer no pertinent authority to support the duty element of their negligence claim. *Sanchez v. Lindsey Morden Claims Services, Inc.* (1999) 72 Cal.App.4th 249 (*Sanchez*), cited by REC, is instructive. In *Sanchez*, the plaintiff made a claim to his insurer under a cargo insurance policy. The insurer engaged a third party claims adjuster to investigate and adjust the loss. The plaintiff alleged that the insurer and the claims adjuster negligently handled his claim, causing damages. The claims adjuster successfully demurred on the ground that it owed no duty to the insured. The Court of Appeal affirmed, holding that "[a]n independent adjuster engaged by an insurer owes no duty of care to the claimant insured, with whom the adjuster has no contract." (*Id.* at p. 250.) The court explained that "the insurer-retained adjuster is subject to the control of its clients, and must make discretionary judgment calls. The insurer, not the adjuster, has the ultimate power to grant or deny coverage, and to pay the claim, delay paying it, or deny it. Further, while the insurer's potential liability is circumscribed by the policy limits, and the other conditions, limits and exclusions of the policy, the adjuster has no contract with the insured and would face liability without the chance to limit its exposure by contract. Thus the adjuster's role in the claims process is 'secondary,' yet imposing a duty of care could expose him to liability greater than faced by his principal[,] the insurer." (*Id.* at p. 253.) Moreover, imposing a duty to the insured would create a conflict of interest for the adjuster, who owes a duty to the insurer who engaged him. (*Ibid.*)

Here, as in *Sanchez*, the insurer engaged a third party to adjust the insured's alleged loss. That adjuster, Rickerby, then retained REC to inspect the Balians' property and give an opinion regarding the Balians' property damage and the appropriate remediation. The relationship between the Balians and REC was thus no closer than, and

indeed one step removed from, the insured-adjuster relationship in *Sanchez*. The reasons given by the *Sanchez* court for declining to impose a duty of care on the adjuster apply with at least equal force to REC. Accordingly, the Balians have failed to allege sufficient facts to support a tort duty to them. The demurrer to their negligence count was thus properly sustained.

2. *Denial Of The Balians' Request For A Continuance*

The Balians contend that the court erred by failing to grant their motion to continue the hearing on the motion for summary judgment in order to conduct further discovery. We disagree.

The Balians' request was based on Code of Civil Procedure section 437c, subdivision (h), which provides: "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just."

The required affidavits "'"must show: (1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. [Citations.]" [Citation.]'" (*Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 715.) To explain the need for additional time, the requesting party must provide "some justification for why such discovery could not have been completed sooner." (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 257.) "An inappropriate delay in seeking to obtain the facts may not be a valid reason why the facts cannot then be presented." (*Ibid*.)

We review a ruling denying a request for a continuance under subdivision (h) of Code of Civil Procedure section 437c for abuse of discretion. (*Jade Fashion & Co., Inc. v. Harkham Industries, Inc.* (2014) 229 Cal.App.4th 635, 643.) "In exercising its discretion the court may properly consider the extent to which the requesting party's failure to secure the contemplated evidence more seasonably results from a lack of diligence on his part." (*Rodriguez v. Oto* (2013) 212 Cal.App.4th 1020, 1038.)

The Balians commenced this action in November 2010. REC filed its motion for summary judgment on September 25, 2013. At that time, the trial was set for February 19, 2014. The motion for summary judgment was initially set for hearing on December 12, 2013. For reasons not disclosed by our record, the hearing was subsequently moved to January 17, 2014. The Balians requested a continuance of the motion in their opposition papers, filed on January 3, 2014.

In support of the continuance, the Balians proffered the declaration of their counsel, Suzanne Rand-Lewis. Rand-Lewis stated that after the motion for summary judgment was filed, she scheduled numerous depositions to take place before the hearing on the motion. She also requested the production of documents, which REC never produced. She began taking Finkelstein's deposition on November 12, 2013. According to Rand-Lewis, "defense counsel interposed improper and unnecessary objections to questions designed to obstruct and delay the proceedings, disrupt [her] questioning and the flow of the deposition, and increase the time and expense of same." More specifically, Rand-Lewis stated that defense counsel interposed objections to more than 50% of her questions and asked for read back testimony 17 times during the 1 hour, 15 minute deposition. Because of defense counsel's behavior, Rand-Lewis stated, she "had no choice but to adjourn the deposition so as to bring a motion for protective order."

Rand-Lewis further stated that the Balians "have been unable to obtain evidence necessary to oppose the Motion including: facts concerning Finkelstein's unfair business practices concerning the many other Armenian claimants; the false protocols he set up that show that particles remain but refer to them as 'trace' without any standard, thus no further cleaning is recommended; the fact that he attended meetings at California Fair Plan where the claim denial strategy was formulated and that this 'post claims underwriting' was formalized when[,] as a result of the Station Fire claims, Fair Plan rewrote its policies to make it impossible for a policyholder to make a smoke and ash claim, which is the exact goal of their denial of the Station fire claims."

The court denied the request for a continuance. Regarding the complaints about defense counsel's deposition conduct, the court stated: "[A]fter three years of active

litigation, including extensive discovery, Plaintiffs' counsel terminated what Plaintiffs now argue is an essential deposition after less than an hour and a half because defense counsel made a number of objections (some of which were well taken, others not) and because the deposition involved numerous read-backs, half of which Plaintiffs' counsel requested herself. This was despite the fact that Plaintiffs' opposition to the summary judgment motion was due some two weeks later and despite the fact that the discovery cut-off date was roughly two months away with a discovery motion cutoff date some two weeks after that." Moreover, the court noted that Rand-Lewis acknowledged the receipt of documents from REC on the record during Finkelstein's deposition, making her assertion that REC "refused to provide any documents . . . demonstrably false."

The court further stated: "[E]ven if Mr. Finkelstein's deposition were reconvened immediately, Plaintiff has failed to identify what actual discovery is required to oppose the motion. . . . [¶] Merely identifying a deposition (that Plaintiffs terminated) and a request for production . . . is not a 'good faith showing by affidavit that a continuance is needed to obtain facts essential to justify opposition to the motion.'" "Plaintiffs," the court concluded, "have failed to meet their burden under [Code of Civil Procedure] section 437c[, subdivision] (h) to continue or deny the motion."

The court acted within its discretion in denying the Balians' requested continuance. As the court observed, the Balians waited nearly three years before noticing the deposition of REC's owner and sole employee, Finkelstein. Even though Finkelstein's counsel never instructed Finkelstein not to answer a question, the Balians' counsel voluntarily terminated his deposition after less than one and one-half hours, then insisted she needed additional information from Finkelstein to oppose REC's motion for summary judgment. The Balians' lack of diligence in conducting discovery supports the court's exercise of discretion in denying the continuance.

3. *Order Granting Summary Judgment*

A trial court properly grants summary judgment when there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A moving party defendant is entitled to summary

judgment if it establishes a complete defense to the plaintiff's causes of action, or shows that one or more elements of each cause of action cannot be established. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 849.) The moving party bears the initial burden of production to make a prima facie showing that no triable issue of material fact exists. Once the initial burden of production is met, the burden shifts to the responding party plaintiff to demonstrate the existence of a triable issue of material fact. (*Id.* at pp. 850-851.) From commencement to conclusion, the moving party defendant bears the burden of persuasion to show that no triable issue of material fact exists and that, based on the undisputed facts, the defendant is entitled to judgment as a matter of law. (*Id*. at p. 850.)

On appeal following the grant of summary judgment, we review the record de novo. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.) "We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." (*Ibid.*)

A. *Concealment*

The Balians alleged that REC concealed from them that the defendants "did not . . . properly determine or provide a complete, accurate or proper evaluation of the extent and nature of [the Balians'] losses and damages," and REC's "failure to properly test and/or provide proper test results."

A claim of fraudulent concealment requires proof of "'"(1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to defraud (i.e., to induce reliance); (4) justifiable reliance; and (5) resulting damage." [Citations.]' [Citations.] . . . A fraud claim based upon the suppression or concealment of a material fact must involve a defendant who had a legal duty to disclose the fact." (*Hoffman v. 162 North Wolfe LLC* (2014) 228 Cal.App.4th 1178, 1185-1186.) The requisite duty can arise when the plaintiff and defendant have a fiduciary relationship, or "some other relationship . . . in which a duty to disclose can arise." (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336-337.) "As a matter of common sense, such a relationship can only come into being as a result of some sort of *transaction*

between the parties. [Citations.] Thus, a duty to disclose may arise from the relationship between seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual agreement." (*Id.* at p. 337.)

Here, REC indisputably had no fiduciary relationship with the Balians. Nor did REC and the Balians enter into any transaction that could give rise to a duty to disclose. Indeed, Finkelstein never met Varouhi and his only interaction with Hakop was a short, perfunctory conversation on the day of the property inspection. At that time, REC was engaged by Rickerby, on behalf of FAIR Plan, and had no contractual or transactional relationship with the Balians. In the absence of any evidence sufficient to create a triable issue of fact with respect to the element of duty, the trial court correctly ruled that the Balians' claim of concealment failed.

B. *The Unruh Act*

The Unruh Act ensures all persons "full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever" without regard to, among other matters, "race, color, religion, ancestry, [or] national origin." (Civ. Code, § 51, subd. (b).) To establish a claim for violation of the Unruh Act, with an exception not here relevant, a plaintiff must prove intentional discrimination. (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1175; *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 664-665.)

In support of its motion, REC submitted Finkelstein's declaration in which he stated that his work regarding the Balians' home "was completed according to the same objective standards that guide [his] work in every other such inquiry or assignment, without ever considering race, nationality or any other unlawful or discriminatory 'standard[]' . . . ." He further stated that he never made any "discriminatory comments" to the Balians, and never entered into any agreement, plan, or scheme with other defendants to minimize or falsify reports or laboratory results, "much less a scheme predicated on anti-Armenian bias." Such evidence is sufficient to establish a prima facie case that Finkelstein was not motivated by discriminatory animus. The burden then

shifted to the Balians to raise a triable issue of fact controverting a lack of animus. They failed to do so.

The Balians relied on Hakop's deposition testimony describing his interaction with Finkelstein in support of showing animus. According to Hakop, Finkelstein asked him where he was from and, when Hakop said he was from Armenia, Finkelstein looked at him in a way, and spoke to him in a tone, that led Hakop to believe that Finkelstein was prejudiced against him. We agree with the trial court that such a subjective opinion based on only one encounter is insufficient to create a triable issue of fact regarding intentional discrimination. To the extent the Balians also relied on the declaration of their expert, Kovar, for this claim, Kovar's opinions regarding Finkelstein's sampling methods, analysis, and conclusions do not support a triable issue of unlawful discrimination. Even crediting Kovar's conclusions that Finkelstein's conduct was below the standard of care, such negligence does not establish animus.

C. *Unfair Business Practices*

The Balians averred that the facts set forth in their general allegations "constitute unfair business practices which are illegal under" the UCL. They did not otherwise allege the particular conduct that violated the UCL.

The UCL defines "unfair competition" to "include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." (Bus. & Prof. Code, § 17200.) The statute, our Supreme Court has explained, "covers a wide range of conduct. It embraces '"'"'anything that can properly be called a business practice and that at the same time is forbidden by law.'"'" [Citations.]' [Citation.]" (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143.)

To the extent the Balians' UCL claim was based on the concealment or discrimination allegations, it fails for the reasons discussed above. To the extent it was based on other conduct, the claim also fails.

The undisputed evidence established that Rickerby engaged REC to conduct an inspection of the Balians' residence, Finkelstein conducted an inspection and took samples for testing, and then reported the test results and gave his opinion on remediation. Finkelstein declared that he carried out his work without considering the Balians' race or nationality and that he never entered into any agreement, plan, or scheme to falsify claims, reports, or results. In opposition, the Balians presented the declaration of their expert, Kovar, who criticized REC's methods and analysis and arrived at a different opinion regarding the presence of wildfire related particulates and the required remediation. As the trial court stated, however, even if Finklestein's inspection fell below industry standards, the Balians offered "no authority to suggest that doing a bad job can, by itself, constitute an unfair business practice." We agree with the trial court's conclusion that doing a bad job cannot, standing alone, constitute an unfair business practice.

4. *Order Denying In Part Motion To Tax Costs*

The judgment was filed on February 18, 2014, and included that REC shall recover from the Balians "costs of suit in the sum of $_____ pursuant to Defendant's Memorandum of Costs to be submitted."

On March 11, 2014, REC filed a memorandum of costs, seeking $7,213.95. On March 27, 2014, the Balians filed a motion to strike and/or tax REC's memorandum of costs (motion to tax costs). REC opposed the motion. The motion was set for hearing on May 13, 2014.

In meantime, the Balians filed their notice of appeal on April 16, 2014. The notice stated that the Balians are appealing from the judgment and, among other orders, "[a]ny and all Orders related to any post-Judgment motions, including but not limited to Plaintiffs' Motion to Strike and/or Tax Costs."

The trial court granted the motion to tax in part and denied it in part. As is relevant here, the court awarded costs for travel to certain depositions and for expenses paid to Case Home Page, an electronic document service provider. The Balians challenge these costs award as unauthorized.

We first address REC's contention that the appeal from the costs award should be dismissed because the Balians filed their notice of appeal before the court's order awarding costs. We reject this argument.

"[W]hen a judgment awards costs and fees to a prevailing party and provides for the later determination of the amounts, the notice of appeal subsumes any later order setting the amounts of the award." (*Grant v. List & Lathrop* (1992) 2 Cal.App.4th 993, 998; see generally Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2015) ¶ 2:156.2, pp. 2-95 to 2-96.) This rule applies here. The judgment expressly provided for the recovery of costs and a blank space for the insertion of an amount to be determined later. Moreover, the Balians' notice of appeal specifically provided that it encompassed an order on the then-pending motion to tax costs. The notice of appeal, therefore, covers the court's order on the motion to tax costs.

We thus turn to the merits of the Balians' claim. They make two arguments. First, the Balians contend the court erred in awarding costs for travel to certain depositions. They point to REC's memorandum of costs worksheet, which set forth the amount of $154.81 for each of three particular depositions without stating the specific nature of the expense. The Balians assert that they "and the Trial Court were left to speculate as to what the claimed costs were actually for." The argument is without merit.

"[T]ravel costs to attend the depositions" are specifically recoverable under section 1033.5, subdivision (a)(3) of the Code of Civil Procedure. Although REC did not initially specify that the stated deposition expenses were for *travel*, counsel for REC explained in a declaration that the challenged costs were for the round trip mileage for the specified depositions. Such evidence supports the court's determination.

Second, the Balians contend that the court erred in awarding $914.95 as costs for Case Home Page. The recovery of expenses for an electronic document service provider is neither expressly permitted nor expressly prohibited by Code of Civil Procedure section 1033.5. In that situation, the item "may be allowed or denied in the court's discretion." (Code Civ. Proc., § 1033.5, subd. (c)(4); see *In re Ins. Installment Fee Cases* (2012) 211 Cal.App.4th 1395, 1431.) Such expenses must be "reasonably

necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation," and "reasonable in amount." (Code Civ. Proc., § 1033.5, subds. (c)(2) & (c)(3).) We review the court's determination of these issues for abuse of discretion. (*Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 990.)

In allowing REC to recover its Case Home Page expenses, the court stated: "While such fees may not be expressly allowed by statute, the Court finds that they were reasonably necessary to the conduct of the litigation and exercises its discretion to allow such costs. . . . [T]he Honorable Lee Smalley Edmon expressly ordered the parties to utilize an electronic service provider and serve all documents electronically through that system. The Court does not find that fees necessarily incurred to comply with a valid court order were merely 'convenient' and the motion to tax those court-imposed costs is DENIED." The court's determination was not an abuse of discretion for the reasons it gave.

DISPOSITION

The judgment, which includes the order granting in part and denying in part the Balians' motion to strike or tax REC's memorandum of costs, is affirmed.

REC shall recover its costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

MOOR, J.*

* Judge of the Los Angeles Superior Court, Assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.